BRUCE C. NEWCOMB

IBLA 80-452 Decided June 30, 1980

Appeal from decision of the Idaho State office, Bureau of Land Management, rejecting desert land entry applications I-16151 and I-16080.

Reversed and remanded.

1. Desert Land Entry: Generally -- Desert Land Entry: Applications

   Where an applicant has filed two desert land entry applications, the earlier of which does not conform to the classification and opening order, and on appeal to this Board opts for the second application to the exclusion of the first, such application may acquire priority from the date the statement of reasons was filed, subject to valid intervening rights or competing interests in the land.

2. Desert Land Entry: Generally -- Desert Land Entry: Applications -- Desert Land Entry: Classification -- Rules of Practice: Appeals: Failure to Appeal

   A desert land applicant, whose application is rejected because of an adverse classification, and does not timely seek appropriate appellate review thereof, loses whatever rights may have accrued to him by virtue of the application and he will not emjoy any preference right to the land when it is subsequently classified as suitable for desert land entry.

APPEARANCES: Bruce C. Newcomb, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is from a decision dated February 27, 1980, by the Idaho State Office, Bureau of Land Management (BLM), rejecting desert land entry applications I-16080 and I-16151 on the (stated) basis of 43 U.S.C. § 321 (1976) which states in pertinent part:

> Except as provided in section 3 of the Act of June 16, 1955, as amended, no person may make more than one entry under sections 321-323, 325 and 327-329 of this title. However, in that entry one or more tracts may be included, and the tracts so entered need not be contiguous. The aggregate acreage of desert land which may be entered by any one person under this section shall not exceed three hundred and twenty acres, and all the tracts entered by one person shall be sufficiently close to each other to be managed satisfactorily as an economic unit, as determined under rules and regulations issued by the Secretary of the Interior.

The applications were filed in response to an order dated September 20, 1979, published at 44 FR 5567 (Sept. 27, 1979), which opened two parcels to desert land application and revoked a previous "initial decision" of September 7, 1978, classifying the two parcels as unsuitable for desert land entry. Parcel "A" was described in the order as constituting the SE 1/4 NE 1/4, SE 1/4 sec. 33, T. 9 S., R. 25 E., Boise meridian, Idaho, and parcel "B" as the S 1/2 SW 1/4, W 1/2 SE 1/4 sec. 34, of the same township. The order also stated that: "All valid applications received between the date of publication of this notice and 10:00 a.m. on October 29, 1979, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing."

Appellant filed one application (I-16151) for parcel "A" described as SE 1/4 NE 1/4, SE 1/4 sec 33, T. 9S., R. 25 E., Boise meridian on October 26, 1979. Appellant's other application (I-16080) describing the land applied for as SE 1/4 sec. 33, S 1/2 SW 1/4, W 1/2 SE 1/4 sec. 34, T. 9 S., R. 25 E., Boise meridian, Idaho had been filed with BLM on October 3, 1979.

Appellant states that earlier applications for the 320-acre parcels were rejected in 1965 and 1978 because the land was declared unsuitable for agriculture and, in essence, contends he should be afforded a preference right to the land by virtue of his earlier applications. Appellant states that he was unaware of 43 U.S.C. § 321 (1976) and assumed that his application I-16151 was viable. His position on appeal is that application I-16080 should be considered null and void and application I-16151 viable and pending.

[1] Section 1 of the original Desert Land Act, Act of March 3, 1877, 19 Stat. 377, provided: "[N]o person shall be permitted to

enter more than one tract of land and not to exceed six hundred and forty acres * * *." The Act of August 30, 1890, reduced the amount of land to 320 acres. The regulation 43 CFR 2521.1(b) states that a person's right of entry "is exhausted either by filing an allowable application and withdrawing it prior to its allowance, or by making an entry, or by taking an assignment of an entry, in whole or in part." Referring to the Act of September 5, 1914 1/ (38 Stat. 712, 43 U.S.C. § 182 (1976)), the regulation further provides that a second entry may be made where a previous allowable application has been filed but where the entry was lost, forfeited or abandoned through no fault of the entryman. However, in the absence of statutory authority therefor, no "second entry" showing can be now made with respect to desert land entries.

The limiting provision in 43 CFR 2521.1(b) is the entryman's entitlement to only one desert land entry. That regulation speaks in terms of "allowable" applications for such entries. That right is exhausted by the specific events listed in the regulation: the filing and withdrawal of an allowable application prior to allowance, the making of an entry, or the taking of an assignment of an entry. None of these circumstances is present in the case at bar since the earlier application, I-16080, filed October 3, 1979, embraced portions of both Tracts A and B contrary to the order of classification and opening. It was therefore not an allowable application and did not exhaust appellant's desert land rights. In his statement of reasons filed on March 3, 1980, appellant opted for application I-16151. All else being regular, that application could be considered for the entry as of March 3, subject, of course, to any valid intervening rights or competing interests in the subject land.

[2] Appellant contends that he should be afforded a preference right to acquire parcel "A" by virtue of his earlier applications and his assertions that his efforts triggered the final favorable agricultural classification. These earlier applications had been rejected because BLM had determined that the lands were unsuitable for desert land entry. The record does not reflect that appellant timely sought review of that determination under 43 CFR Part 2450. The rejection of his and his then wife's applications for desert land entry, I-016034, I-14361, and I-14531, became final and the cases closed respectively on October 17, 1966, September 7, 1978, and September 7, 1978.

Appellant's failure to pursue timely his right to seek review of the former adverse classifications results in his loss of whatever rights might have accrued to him under the then pending applications

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1/ Repealed by section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2787, effective immediately as to desert land entries, but effective 10 years from October 21, 1976, as to the homestead laws insofar as they apply to Alaska.

and petitions for classification. Diane L. Somsen, A-27514 (January 30, 1958). See Betty Ketchum, 67 I.D. 40 (1960); Duncan Miller, A-28267 (June 8, 1960); John R. Moran, A-27463 (October 21, 1957); Edward Christman, 62 I.D. 127 (1955); C. T. Hegwer, 62 I.D. 77 (1955); Garth L. Wilhelm, 62 I.D. 27 (1955).

We will therefore remand the case to the State Office with instructions to consider appellant's application I-16151, as filed as of March 3, 1980, subject to prior valid filings.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded for appropriate action consistent herewith.

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Frederick Fishman
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Anne Poindexter Lewis
Administrative Judge